United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-7051

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY BUCHMAN and SANDER BUCHMAN, as Executors of Samuel Buchman, Deceased,

Plaintiffs/Appellees,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R. ACKMAN, as Trustee of American Foam Rubber Corp., Bankrupt,

Defendants,

MARIE LOUISE de MONTMOLLIN, ALEXANDER F. PATHY and SUZANNE M. PATHY,

Defendants/Appellants.

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PETITION FOR A REHEARING

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PLEASE TAKE NOTICE that the Plaintiffs/Appellees (Dorothy Buchman et al as Executors of Samuel Buchman) hereby cross move this Court at a time and place to be set by the Court, for an order pursuant to Rules 27, 35(c) and 40(a) of the Federal Rules of Appellate Procedure, enlarging the time within which the Plaintiffs/Appellees may apply for a rehearing, or in the alternative, permitting the filing of the annexed affidavit in support of a rehearing, and granting undersigned such other and further relief as this Court may deem just.

DATED: New York, N.Y.
February 24, 1976

JOSEPH HELLER and JACOB E. HELLER
Attorneys for Plaintiffs/Appellees
51 Chambers Street
New York, N.Y. 10007

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TO: WINER, NEUBERGER & SIVE
Attorneys for Defendants/Appellants
425 Park Avenue
New York, N.Y. 10022

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STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JACOB E. HELLER, being duly sworn, deposes and says:

I am one of the attorneys for the Plaintiffs/Appellees, Estate of Samuel Buchman.

I did not receive a copy of the decision of this Court on this appeal until the 9th or 10th of February, 1976. I then sent it down to Mrs. Dorothy Buchman in Florida. Thereafter, approximately February 15, 1976, I was asked to advise the client as to my opinion relative to a motion for a re-argument and certiorari to the United States Supreme Court.

Within a few days I sent such opinion. It is being studied by the attorney for the Estate in Florida and I have not been advised as yet as to my instructions.

It is at this juncture that I received appellant's application.

I respectfully request that this Court reconsider its holding that appellee may not recover that portion of the judgment based upon the discharge of the $322,000 in

American Foam Rubber debentures and notes.

I also request that this Court reconsider its award of costs of the appeal to appellant in view of this Court's affirmance of that portion of the judgment appealed from which is based upon the payment of the $15,000 in Burlington debentures. That part of the judgment affirmed is for $29,000 and the part reversed is for $11,000. We believe that under the circumstances, the costs of appeal should be awarded to appellees and not appellants.

This Court based its decision upon a distinction between the inchoate right of a dominant creditor under a subordination agreement to the dividends the subordinated creditor may receive in a bankruptcy, to a situation in which the debtor is in bankruptcy and the dominant creditor and the subordinated creditor contest the right to the dividend.

This Court stated that the subordinated creditor may transfer its claim against the common debtor prior to a bankruptcy so long as the subordination agreement does not contain specific language prohibiting the same. It so held even though by doing this, the effect is to deny the right of the dominant creditor from receiving the future bankruptcy dividend the subordinated creditor may be entitled to receive.

Our position is that no specific language barring a transfer need be in the subordination agreement.

Our position is that no subordination agreements now extant (to our knowledge) contain specific barring language. We submit that one of the well accepted principles is that the agreement itself is considered to have this very effect -- to wit, that in the future (and it must of necessity be in the future) should there be a bankruptcy, the dominant creditor will receive the subordinated creditor's dividend.

We reread the case of BANK OF AMERICA NAT. TRUST SAV. ASSN. vs. ERICKSON, 117 F. Rep. 2d 796 (9th Circuit); IN RE CREDIT INDUS. CORP, BANKRT., 366 F. Rep. 2d 402 (2d Circuit) and CHERNO vs. PUTCH AMER. MERC. CORP. 353 F. Rep. 2d 147 for the specific purpose of learning whether there was any specific language in the subordination agreement stating or

prohibiting a transfer prior to bankruptcy.

The language in CHERNO is as follows:

> "The agreement provided that * * * in consideration of the premises and to individual said party of the first paty (Dutch American) to accept said note and lend the said $50,000.00 * * * the said parties of the third (Blanmill Realty Co.) and fourth parts (five named individuals) hereby covenants (sic) and agree * * * that all obligations of the parties of the second part to the parties of the third and fourth parts be and shall continue to be subject and subordinate in lien to the lien of said note for $50,000.00 * * * and further that no part of the indebtedness of the parties of the second part to the parties of the third and fourth parts (sic) shall be paid until all sums due and owing to the party of the first part shall have been paid and disposed of."

The language in BANK OF AMERICA NAT'L TRUST is as follows:

> "Seventh: S.W. McComb, R.E. Hickerson and R.E. Hitt agree to and do hereby defer and subordinate any and all claims which they may have jointly or severally against the debtor, including any claims for money loaned or salary due, until all other claims of the debtor including interest accrued and to accrue thereon, have been fully paid, satisfied and discharged, whether through reorganization, refinancing, sale, assignment for the benefit of creditors, bankruptcy, debtor proceedings or any other means, whether voluntary or involuntary."

In neither case did the subordination agreement contain specific language prohibiting a transfer prior to bankruptcy.

Our brief referred to the case of MATTER OF CREDIT IND. CORP BANKR., 366 F. 2d Rep. 402 in which the Court held,

> "It is frivolous to argue that the agreement failed to provide expressly that the agreement applied in bankruptcy"

thus clearly establishing the implication of the subordination agreement to accomplish this very purpose.

In BANK OF AMERICA NAT'L TRUST SAV. ASSN. vs. ERICKSON, 117 F. 2d 796, the 9th Circuit said,

The subordination debt is 'locked in' and its distributional value in bankruptcy becomes a security benefitting the senior debt holder."

It is our considered opinion that this Court's decision does violence to a great number of subordination agreements now extant and enunciates a principle of law inconsistent with the cases above cited.

We ask reconsideration and upon reconsideration an affirmance of the judgment (in toto) appealed from.

We read the memorandum of appellant and we find nothing therein not previously argued in the brief or in open Court. Our brief is a complete answer thereto as is Judge Cooper's decision.

Jacob E. Heller

JACOB E. HELLER

Sworn to before me this 24th
day of February, 1976

JOSEPH HELLER
Notary Public, State of New York
No. 24-2108
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES COURT OF APPEALS (d Cir.)

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FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY BUCHMAN and SANDER BUCHMAN, as Executors of Samuel Buchman, Deceased,

Plaintiffs/Appellees,

-v-

AMERICAN FOAM RUBBER CORP., et al.
Defendants

MARIE LOUISE de MONTMOLLIN, et al.
Defendants/Appellants

PETITION FOR A REHEARING

JACOB E. HELLER & JOSEPH HELLER
Attorney for Plaintiffs

Office and Post Office Address
51 Chambers Street
New York City 10007 N.Y.
Tel.No. 212-962 5649

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated, *19*

Attorney(s) for

d *19*

The undersigned, an attorney admitted to practice in the courts of New York State, hereby affirms as true under all the penalties of perjury that affiant is

the attorney(s) of record for
in the within action; that affiant has read the foregoing and knows the contents thereof; that the same is true to affiant's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that those matters affiant believes to be true. Affiant further says that the reason this verification is made by deponent and not by

The grounds of affiant's belief as to all matters not stated upon affiant's knowledge are as follows:

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on *19*

Dated,

Yours, etc.
JACOB E. HELLER

Attorney for

Office and Post Office Address
51 Chambers Street
New York City 10007 N.Y.

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.
one of the judges of the within named Court, at

on the *day of* *19*
at *M.*
Dated,

Yours, etc.
JACOB E. HELLER

Attorney for

Office and Post Office Address
51 Chambers Street
New York City 10007 N.Y.

To

Attorneys for